UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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IN RE: TERRORIST ATTACKS OF SEPTEMBER 11, 2001

CASE NO. 03 MD 01570 (GBD)

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New York, N.Y.
April 24, 2014
2:09 p.m.

Before:

HON. FRANK MAAS,

Magistrate Judge

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(In open court)

(Case called)

(Appearances noted)

THE COURT: Good afternoon, everyone. I guess there are two motions that we need to consider today. First, the motion to compel WAMY to produce its documents here and related relief, and then the motion for sanctions. I don't have any particular view as to which you should address first. Any preferences?

MR. CARTER: No preferences from our perspective, your Honor.

THE COURT: Why don't we start with the motion to compel, the WAMY motion.

MR. CARTER: Thank you, your Honor. I think from the plaintiff's perspective, your Honor, the papers concerning this motion are relatively complete themselves, and there are just a few points that we really would like to emphasize during argument today.

THE COURT: Okay.

MR. CARTER: If we can, we'd like to begin with this ancillary issue concerning the cutoff date for the merits discovery concerning the charity defendants. We think quite clearly this was an issue the Court previously addressed with global application; albeit, in the context of the dispute involving the International Islamic Relief Organization and

Muslim World League, but both the content of the discussion and the nature of the ruling indicated that it was intended to have broad affect for all of the merits of discovery on defendants.

So WAMY's continued resistance to this rule is troubling from our perspective, all the more so insofar as it's tied to this very tenuous argument about the scope of jurisdictional discovery that was permitted as to Saudi Bin Laden group, which as your Honor will recall primarily concerned potential theories of general jurisdiction based on Saudi Bin Laden's presence in the United States.

So there's really no analog to the circumstance there. It was jurisdictional discovery and not merits. On the other hand, WAMY is identically situated to the Muslim World League, IIRO, and all the other defendants, and so for that reason, we think that 2004 was very clearly a rule that was already in place.

THE COURT: Well, I don't disagree with you, and even if it weren't a general rule, I think it would be desirable to have a general rule because there certainly not parties here that individualized findings with respect to each that would result in many different termination dates.

And I know you said it in your papers, but you suggest that by asking for 2002 rather than 2004, there were some critical documents that you may be deprived of, or potentially critical documents, and I guess my question is whether those --

what's the concern?

MR. CARTER: Your Honor, I think the concern that we expressed originally with regard to this issue is that a lot of the investigations that occurred following the events of 9/11 didn't really kick into full swing until 2003, 2004. If you take, as an example, the designations of the IIRO offices, those actually came down in 2006.

So there's fair evidence in the record that this matter was really a focal point for a larger period of time than we've suggested. We know, in particular, that pressure mounted on Saudi Arabia to exercise control over its charities in that 2003, 2004 period, and that the Saudis got somewhat serious about the issues following the bombings in Saudi Arabia in 2003. So those are, sort of, the basic predicates for thinking that a 2004 rule has a little bit more logic to it.

THE COURT: Anything else you wanted to add?

MR. CARTER: Not on that point, your Honor. With that, I would turn to the issue of the production of documents here in the U.S.

THE COURT: Yes.

MR. CARTER: And the motion implicates the obligations of two entities, here, both WAMY Saudi Arabia, as well as the U.S.-based entity, WAMY International, and that's significant in some respects. WAMY really cites no authority that would support the proposition that a foreign defendant that is

subject to jurisdiction in the United States for claims arising from events and injuries occurring in the United States can faithfully discharge its discovery obligations by shipping documents from all over the world to a remote, inconvenient and potentially dangerous location and telling the other parties to come there.

It certainly cites no authority to support the position that a U.S.-based entity with custody and control over the documents can direct a propounding party to go visit a foreign subsidiary somewhere else in the world and thereby discharge its obligations.

And if that were the rule, U.S.-based corporations would systematically house critical documents abroad for the specific purpose of creating a barrier to discovery, which is a practice that the U.S. courts have consistently rejected as inappropriate.

And so for those reasons, it seems clear that the production of documents in the U.S. is consistent with both general practice and also critical to the efficient management of this MDL proceeding.

The cases that WAMY supports in support of its view that it's not obligated to incur copying costs and simply needs to make the documents available for inspection, are readily distinguishable because they all involve circumstances in which the defendant or other party made the documents available at a

convenient location, either within the jurisdiction where the litigation was pending or somewhere nearby and convenient within the United States. And that's, again, not the circumstance we have here, and it's also distinguishable --

THE COURT: Go on.

MR. CARTER: It's also distinguishable, your Honor, because many of the documents at issue presently housed in Saudi Arabia came from other places and were shipped there, rather than simply being shipped here, which is an additional problem.

THE COURT: And that was what I was about to ask you. I gather it's not the case that WAMY U.S. shipped its documents; is that correct?

MR. CARTER: We don't believe so, your Honor.

THE COURT: It's just simply saying, as you understand it, to the extent there were any documents that we have control over, they are Saudi Arabia?

MR. CARTER: I think, for instance, your Honor, the documents that would have been in WAMY Pakistan, rather than being shipped to U.S. for production, were shipped to WAMY Saudi Arabia. WAMY Indonesia, the same sort of practice occurred.

THE COURT: Right.

MR. CARTER: In addition to sort of these general principles, your Honor, there are a range of equitable

considerations and practicable realities relating to the management of this MDL that counsel are in favor of requiring WAMY, like everyone else, to produce their documents here. As we've indicated, every party in the litigation, other than WAMY, has agreed to produce its documents, almost without exception, in electronic form here in the United States. That includes the Saudi defendants.

Following the series of decisions that Judge Daniels issued in 2010, we then had meet and confers with the defendants' executive committee. We certainly would like this agreement to have been more explicit in writing, but there was a dialogue raised by the defendants expressing a preference for production of documents in single-page TIFFs. Every party, other than WAMY, has since proceeded to produce documents in that matter, at least reflecting through their course of conduct and understanding in common agreement, that it should proceed in that way.

The difficulty, were WAMY's view to be endorsed, is that it would lead to a cascade of discovery disputes where parties sought to, tit for tat, impose significant costs of tracking down documents and copying them. On the other, even if you look at the limited instance of this dispute here, if we were required to pay WAMY to copy its documents and produce them to us, the next step would be our filing a motion seeking to compel WAMY to reimburse us, and for other sanctions for the

costs we incurred to have copied documents that proved to be completely irrelevant or included solely to sort of foster WAMY's own defenses.

And the manner in which all other parties have proceeded clearly reflects the understanding by the group, as a whole, that that's not helpful to the efficient process of this litigation and that we're all trying to do it, and it's just an example of WAMY not playing by the same rules that everyone else seemed to agree are appropriate in the litigation.

A word or two only, your Honor, about the indices. I think there are examples in there that pretty clearly demonstrate that the indices are --

THE COURT: I looked at your exhibit compiling some specimen, but I also looked through the indices myself, to the extent I have them.

MR. CARTER: So they're not sufficiently detailed to displace the normal obligation to produce the documents in a reasonable manner.

The last thing, your Honor, that we had raised was although the indices are -- well, two related things, your Honor. Also central to this is that the documents that are being withheld are of core relevancy to the proceedings, at least as near as we can tell; so --

THE COURT: Say that again?

MR. CARTER: These are not fringe issues, but rather,

the core, central, relevant documents in the proceeding. For instance, the kind of financial records that your Honor already ordered were clearly of central relevance in the context of the Muslim World League and IIRO proceedings. I think what is more troubling, from our perspective, is that in looking at the indices more closely, we now see there are documents housed in Saudi Arabia relating to WAMY Canada that have never been produced to us here in the United States.

And in the connection with the dispute we had with WAMY over the lack of cooperation on the part of WAMY Canada, WAMY made its view known that it had taken every possible step to cure that problem. But, of course, the first step in curing that problem would have been to send us the documents that are sitting in Saudi Arabia pertaining to WAMY Canada and that had been sent to Saudi Arabia about WAMY Canada. And that still hasn't happened even after the hearing.

THE COURT: I don't remember an issue as to WAMY Canada's documents. That was some time ago?

MR. CARTER: No, your Honor, it was at the last hearing. WAMY Canada, it was the branch that, following the revocation of its registration by the Canada Revenue Agency, had become suddenly uncooperative.

THE COURT: Oh, right.

MR. CARTER: So, you know, what we see here is that there are a host of documents pertaining to WAMY Canada's

operations in relationship to the Saudi headquarters that, throughout that dispute remained sitting, you know, somewhere on a floor in Riad rather than being produced to us. You know, that was not only inconsistent with WAMY's obligation in dealing with the lack of cooperation by WAMY Canada, it also precluded us from having a complete record in that dispute. One of the issues that WAMY raised is that this has been a historically contentious relationship and that you can't blame WAMY Saudi Arabia for the sudden decision of WAMY Canada not to cooperate.

Well, the documents, at least as far as we can tell from the index, suggest a more cooperative historical relationship, and we're left to wonder whether the sudden lack of cooperation by WAMY Canada was the result of some action or sanction by WAMY Saudi Arabia that had the predictable result of driving them to no longer cooperate. So these are centrally relevant documents.

The last point I think, your Honor, is we've also raised a concern, again based on the indices, although it's hard to fully understand them, that WAMY has not undertaken a search consistent with the Court's prior orders concerning the scope of relevancy for purposes of claims against charity defendants in this case.

Your Honor, had, in the context of the IRL and Muslim World League, issued a series of orders requiring the

production of organizational documents, banking and auditing records, the materials underlying those banking and auditing records. And we don't see, from the indices, anything suggesting that that kind of a search has been undertaken.

So we were also seeking an admonition to ensure that WAMY fulfills the obligations that have already been articulated by the Court. Thank you, your Honor.

THE COURT: Thank you. Mr. Mohammedi?

MR. MOHAMMEDI: Yes, your Honor. I would like to address the production of documents here in the United States, as well as the scope of discovery and leave Mr. Goetz to address the indices. Your Honor, I'm not going to address the rhetoric that were submitted in their motion, as well as reply brief. However, I'm going to concentrate on the law, and that's really the issue that, with respect to the cost of production and copying production.

THE COURT: One of the things you say in your letter, and I'm reading from Page 3: WAMY is not obligated to do anything beyond permit inspection of its voluminous documents as they are kept in its ordinary course of business.

MR. MOHAMMEDI: Right.

THE COURT: But by virtue of shipping the documents from various locations to Saudi Arabia, they're no longer being kept as they were in the ordinary course of business; isn't that so?

MR. MOHAMMEDI: Your Honor, I can give the example you gave a while ago about you taking -- you have cases in your chambers and you want to review documents from your chambers. You take them to here. You can either mix them with everything, or you can take them as folders, you review them, you bring them back. This is exactly the same thing what was happening with WAMY.

THE COURT: So you're saying that even though some of the indices, as plaintiffs pointed out, do not indicate sources for each document that's part of the production, you can say from whence it came?

MR. MOHAMMEDI: I mean, some of them you know where they came from, yes. They are -- some of them are -- some of them are duplicates, your Honor. Some of them are stored in Saudi Arabia because they have communication with the chapters, and when they ask the chapters to send those documents, they will take them to where they are and they keep them. And that's how they keep them.

If there is no source here, it's not relevant exactly what -- I think the source issue is an issue that we take with plaintiff.

THE COURT: I mean, I understand that, undoubtedly, there are duplicates, but let's assume that someplace in this 120,000 documents there's a smoking gun. The smoking gun appears in the files of WAMY Indonesia rather than in the files

of some other subsidiary or WAMY Saudi Arabia, but not WAMY Indonesia. That potentially has significance, which is why I'm asking whether the documents, except for having been moved to Saudi Arabia, are still in a format where, as to each document, you can say a particular location was the source?

MR. MOHAMMEDI: Yes, there are, your Honor. There are specific forms.

THE COURT: Okay. Go on.

MR. MOHAMMEDI: And when the search happened, it identified the document. It kept them where they should be. They just identified the documents that's what they do, but I'd like to go back to the real issue here about the production of documents. And I think the indices, I believe that Mr. Goetz is going to address in some more detail.

I think plaintiffs are either on purpose confusing between production of documents, or they're not making a difference between them. And I think Federal Rules of Civil Procedure 34(a)(1), parties only need to make requested documents available for inspection and copying. It is not required to produce copies of natural document, not obligated to pay for the cost of copying and shipping the documents. And the cases that we cited are very clear on this, and ever the cases that they cited themselves, they support our proposition. And I can go into detail. Plaintiffs, for instance, cite Cleverview --

THE COURT: Just tell me again which part of Rule 34 you were just quoting?

MR. MOHAMMEDI: It's 34(a)(1).

THE COURT: Okay. Go on.

MR. MOHAMMEDI: So I think the plaintiff, in even citing that case law, they mention Cleverview Investment v. Steven Oshatz, in that case specifically, it's discussed the Federal Rules of Civil Procedure 34(a)(1), where it specifically stated, and I can --

THE COURT: Well, let's ignore the law for a moment and --

MR. MOHAMMEDI: But, your Honor, this is very important.

THE COURT: I'll let you get back to it. I just want to ask --

MR. MOHAMMEDI: Sure.

THE COURT: -- a practical question. Let me assume for purposes of questioning that Mr. Carter is a frequent traveler to Israel and that he and Mr. Goldman, who -- from his name, I assume is Jewish; I shouldn't make the assumption -- together --

MR. GOLDMAN: I'll stipulate.

THE COURT: -- they want to go together and travel to Saudi Arabia to look at the documents. As I understand it, neither of them may be admitted to the country for that

purpose.

MR. MOHAMMEDI: It doesn't matter -- sorry.

THE COURT: And I suppose you can tell me that, you know, there's lots of plaintiffs' lawyers, and they can find people who qualify. But why shouldn't that be a concern of mine?

MR. MOHAMMEDI: Your Honor, like you mentioned, there are plenty of lawyers out there, first.

Second, Saudi Arabia is not a place where there are no foreigners, there are not a place where there are no Jewish people visiting, there are not a place where investors are going, there are not a place where business people are going. They make Saudi Arabia as a war zone, where they're so afraid to go.

They could not support their claim. They could not provide any information to support that claim, plus the fact they didn't even try. Did they apply for a visa to Saudi Arabia? They didn't even try to do that. Now, they cannot come to this Court and say we cannot do it without even trying. Here they claim against WAMY --

THE COURT: Let me just understand what you're saying. You're representing that if an attorney on the plaintiffs' side, who has Israel as a stamp in their passport, although I'm not sure the Israelis frequently stamp U.S. passports, but assuming they did, and Mr. Goldman applied for visas, they

would be granted?

MR. MOHAMMEDI: I am not making that representation. What I am saying is that they have not tried.

THE COURT: Okay.

MR. MOHAMMEDI: That's what I'm saying.

THE COURT: Okay. Go on. I'm sorry. I interrupted you when you were about to tell me about the law.

MR. MOHAMMEDI: Sure. You know, in the same case that I cited -- by the way, that case, it was a split of cost, and issue was one party did not inform the other party that they would charge them for copying costs. And during that conversation, with the case law which I can give that to you if your Honor wants, it's very clear. Here, if you go to Page 2, it specifically allowing party to make original documents available for inspection without any copying to be at adversary's expense.

The law specified that when the party believes it will be facing enormous production costs, the presumption is that the responding party must bear the expense for complying with the discovery request, but he may involve the District Court discretion in their Rule 26; therefore, protecting him from undue burden of expense in doing so.

And many cases cited the difference between having documents available for production, which is the production itself, and the copying costs, which is the reproduction. So I

think they are mixing the two and making it sound as if WAMY did not comply with the discovery obligation. WAMY did.

They also make the -- they make this argument that they, WAMY, has to show that they are not able to afford the discovery cost. And they cite Zubulake v. UBS Warburg. As a matter of fact, this case speaks about the retrieving data, which was very expensive for the party. WAMY already done that, and they spent 1.5 million in there. It was not about copying costs.

THE COURT: Well, the cost of the indices could have been spared had a document -- I mean, money that was spent preparing indices could have been spent simply converting them to an electronic form and shipping a handful of disks or a hard drive to the U.S., correct?

MR. MOHAMMEDI: Yeah, but, you know, when you make copies or make scanning the documents, most of the documents were not in electronic version. They were almost all of them in hard copies. They were reviewed. When they were reviewed, they were taking notes, and that's where the indices came from. Obviously, when you review the documents, you are taking notes; so it became part of retrieving the data, which is different from copying costs. Even though they had the copy, they would still have to go through that. That's what differentiates between production of documents, which WAMY has done, and copying costs or scanning of documents.

THE COURT: Well, but how about the fact that we're talking about the difficulty of reviewing them in Saudi Arabia when many of the documents were in countries that may have been more accessible to plaintiffs' counsel, and WAMY simply decided to move them to Saudi Arabia?

MR. MOHAMMEDI: Your Honor, where? Example, where did they think they would be accessible? Much of them are hotspots, such as Pakistan. Do you want to plaintiffs to go to these places to review the documents? We made it easier for them. We made it easier for them.

THE COURT: That's why I backed off picking a WAMY country because I recognize that none of these places --

MR. MOHAMMEDI: That's the reason they we are in this lawsuit because WAMY happened to be in this hotspot; so that's why plaintiffs are suing WAMY for that purpose.

Now, I think also the hardship issue, I think it's not something that WAMY will have to show because the hardship is what retrieving there, but I will just mention something about the argument that plaintiff made about Kingdom Saudi Arabia offered a grant of $33,000, which is about the equivalent of about 100,000 Saudi riyal. Isn't that what the not-for-profit organization do? They get grants.

You're not going to have Merck, who is a billion dollar company get a grant for $33,000, but that's beside the point. I just want to make sure that -- WAMY, it is a

not-for-profit organization, no matter what plaintiff said.

Now, as far as them saying that MDL cases, they favor cost sharing, I have no idea where they get that from. As a matter of fact, in the Merck case, it was not order of the judge. It was an agreement between the two parties, which was entered into an order, and -- but they forget to just go through other case law that they say we did not support our with any authority, we did. They did not. They did not provide any case law that says that a party is obligated to pay for the cost of copying and shipping.

THE COURT: Well, but they also say that this was, although not reduced to writing, the agreement among the various parties, or at least among the two executive committees; is that the representation?

MR. CARTER: That's correct, your Honor.

THE COURT: So that the two executive committees, one of which represents WAMY's interests, among others, they say agreed that this would be the ground rules.

MR. MOHAMMEDI: We were not part of that agreement. Only thing I can tell you is we reach out to plaintiffs for an agreement and they refuse. We ask them to split the cost, and they refuse. So in other cases that I mentioned that -- actually, in those cases the Cleverview and the other cases, and we have another case actually issued from California, that specifically the issue became there was no agreement to show.

And even in those cases, the Court they split, sometimes the Court, they did not say -- even with Merck, they say we have a specific number of documents that we have -- the requesting party will have to pay. And so that's what we tied to do with plaintiff. We have been trying to do this with them for a long time, and they just basically refusing to do so.

So that's why we are here, trying to find a way to explain our position that reproduction of document, it is not obligation of the party producing the documents. And we cannot be forced to do so while we did everything we could to search for those documents and produce those document then make them available. We gave them two options, and even though their admission they cannot proceed, we say okay, then that's fine. We can ship those documents to you at your cost. I think that was a fair proposition, and plaintiffs just ignored it and didn't want to respond to it.

THE COURT: What's the cost of shipping the documents?

MR. MOHAMMEDI: I think -- We don't know. We don't know the cost. I mean, the issue here is either shipping the documents or scanning them, and that's really what's going to be. We can scan those documents for them, and it would be the cost of scanning them. And there has been an electronic -- so far, most of the documents have been produced in electronic version. They have not been produced most of the time.

THE COURT: What percentage of your documents are

electronic?

MR. MOHAMMEDI: What we have in electronic, we have produced to them so far. Your Honor, we produced 25,000 documents. They make it sound like we have not produced anything. We have produced 25,000 documents to them.

And I'd like to go to the point where they said about WAMY International and WAMY Saudi Arabia. I think Mr. Carter, he misconstrued the letters to him about getting the documents. The documents that we asked them to take them. These were documents that us, as counsel, brought from Saudi Arabia, not WAMY International get those documents from Saudi Arabia. So -- and we said, remember, your Honor, it was following the hearing that we had, and I stood up and I said, in good faith, we are going to bring some documents for plaintiff to -- for plaintiff production. I think it was about two or three thousand documents, and that's what happened. We asked them to come and get them.

So let me see if there's anything else I forgot to mention.

THE COURT: Sure. One thing you haven't talked about is the cutoff date.

MR. MOHAMMEDI: Yes, that's what I'm going to mention now. The cutoff date. We do believe that the MWL and IRO hearing did not apply to us. First, we never briefed this issue before, and second, we believe that the transcript showed

that it was specifically addressed to the IRO and MWL.

Now, as far as their argument that this should be general rule, I do believe, actually, plaintiff, that there are some defendants here that can attest to that. They entered into an agreement with some other defendants to designate specific scope of discovery. If they do believe this is a general, apply to everyone, why would they do that?

So it is not a general rule. It was applied to IRO and Mr. Mordley. And as far as their trying to establish the relevance why these documents are responsive to them, I think they made an example of Jelaidin being invited by WAMY. Therefore, WAMY should participate, and they said speak of one of the conference in no way establish that WAMY is a Saudi charity that has served as a fully integrated component of Al-Qaeda organization structure by inviting Jelaidin in 2008. In fact, we were in a hearing with Judge Daniels, just in the motion that was held before this Court -- I mean, before we had this sitting with your Honor.

The conduct of WAMY to invite Jelaidin does not raise to a claim. If that's the case, then Jimmy Carter, where he met with Meshal, then Jimmy Carter -- then people would have a claim against Jimmy Carter when he met with Meshal, who was head of Hamas. So I don't think that -- I think it's not an argument for them to use, because of that the extension of discovery should be 2004.

As far as the investigation that they're talking about, you know, we have no issue producing those documents related to investigation, but they have to be specific to investigation. We cannot make a general rule that everything from 1992 to 2004, that everything that we're asking should be produced to us. If that's what they're requesting, that's fine. We can provide that to them. If we have them, we'll produce them, but they cannot be spread to all other requests. I think they need to be specific to the 2002 request.

I think that's all. Thank you, your Honor.

MR. GOETZ: May I stand? I've been sitting for a while.

THE COURT: Yes.

MR. GOETZ: Your Honor, as I understand, the purpose of the indices, they are to facilitate plaintiffs' inspection and copying of the records that are in WAMY's file room. From my reading of the transcript of the February 15, 2012, hearing, the Court really had two broad requirements for these indices. They have to be intelligible and workable. So with those broad concepts in mind, we've produced the 155 indexes.

They are not meant, as I understand it, to replace the documents themselves or the evidence themselves. It's basically a tool to say, all right, these are some documents we're interested in, we want to inspect and copy these documents. These other ones, they don't pertain to our claims.

We're not interested in them. And that's what these indices do.

The Court's reviewed them and, ultimately, your Honor is the one that matters. But you note that they correlate to specific document requests. So by definition, if we're talking about a document request for reports and we give an index that's responsive to that, well, these are all reports, they're within that category. So by tieing the documents in the indices to the requests, specific requests, that's a definitional exercise or definitional statement that makes them intelligible and workable.

Beyond that, and the Court has reviewed Exhibits E through H in plaintiffs' motion, the documents -- the indices, most of them they give a description of the subject, they state who the document is to, who the document is from, and they give the date. And all I think plaintiffs' argument is really putting form over substance. Well, we don't have it, whether it's an annual report or a quarterly report.

THE COURT: Refresh my recollection. How did we get to indices in the first place as opposed to the documents? I know my recollection is that WAMY was not the only defendant to resort to indices. Do I have that right?

MR. CARTER: That's correct, your Honor.

THE COURT: But refresh my recollection as to how the indices came about.

MR. GOETZ: Well, my understanding is that, I think, MWL had the first indices, and they were problematic because, as I understand it, they were not specific document-by-document breakdowns. They were broad descriptions that were not tied to specific requests.

But as I understand, as I said the purpose and how we got here, is basically when you're talking about a file room full of hard copies, documents, the purpose of the indices are to facilitate -- production having been made to facilitate the inspection and the copying. That's what I understood the purposes. They're not to replace the documents themselves, but to help plaintiffs exercise and fulfill the discovery they want to do. So I think that's the ultimate test. The Court gave the standard, are they intelligible and are they workable? And they are.

Plaintiffs arguments, as I said, they really put form over substance. They talk about lack of uniformity. They are in different formats. They had different teams working on them. They gave different products. But, again, does that mean index A is not intelligible and workable because it's in a different format from index B? No, it doesn't, not at all.

There are, for example, the complaint or the issue was made, well, as to correspondence. It doesn't matter -- well, it's not described as an e-mail or a letter or a memorandum. Well, it's the substance, the subject of the document that

should be important because I can't believe if you have a correspondence confirming wire transfer to Osama Bin Laden, it's going to matter whether or not that's a letter or an e-mail. They're going to want to get it.

THE COURT: I thought Mr. Mohammedi was telling me if it was an e-mail, it was already produced, unless perhaps it exists in paper form also. I thought he said everything electronic had been produced. Did I misunderstand that?

MR. MOHAMMEDI: Your Honor, the electronic format we produced them, most of them were produced, and those indices were made two years ago. Right? And now, WAMY Canada, when -- Mr. Carter mentioned WAMY Canada, doesn't mean that all the documents in the indices are not produced. There are some documents, many of them, that have already been produced. They were used as an example.

THE COURT: So the answer to my question is, if there's something in the indices, that's in electronic form, it has been produced?

MR. MOHAMMEDI: In good faith, for what we think, that's been produced. For what we believe, that -- I mean, I cannot page a representation a hundred percent, but most of them, we believe were produced.

MR. GOETZ: And most of the records that I've seen, your Honor, are not electronic communications. Those are the letters, memo, but my point, setting aside e-mails for this

example, it doesn't matter whether it's a memo, a correspondence or a card, again, I think that's form over substance.

Plaintiffs make the argument that, well, the description are insufficient but, yet, on the other hand, they're arguing that there's a number of these documents that are just not relevant. So I think, to some extent, there must be some intelligible aspects to these that they're able to make that differentiation.

WAMY has identified the particular documents that it believes are within the scope of discovery, and to some extent, your Honor, what we have here is the pot calling the kettle black. Because, if you recall, this came up at the February 15, 2012, hearings when, at that time, WAMY was chastising or complaining about the plaintiffs producing all these newspaper clippings that really had nothing to do.

And the Court said, well, that doesn't really control. If the producing party feels that they're responsive, they produce whatever responded. And I think the Court said whether they're garbage or not, in the receiving parties' view, is not controlling.

Just because these document in some instances may not support the plaintiffs' claims does not mean that they're not within the scope of discovery that might be responsive to that particular request.

And one point for clarification, your Honor, in reviewing these indices, I want to make clear that Exhibit D is a different type of index. Exhibit D -- and this was some confusion, I think, from the February 15, 2012, hearing. Exhibit D is an index of documents that have been produced. So the other exhibits, G, E through H, are the index of the documents that are in the file room in Riad.

And one unfortunate thing, your Honor, speaking about the February 15 of 2012, is that that is the last time that this issue, the sufficiency or insufficiency of these indexes, came up. I mean, all of these issues and complaints that we're hearing today, the first time we heard about those was on March 14 of 2014, over two years later.

And there have been absolutely no indications from the plaintiffs between February 15, 2012, and February -- or March 14 of 2014, that there was any insufficiency. And I would note to the Court your comments on February 15th when this issue of the indexes came up. You said, well, until the two sides have a more focused discussion about that with respect to the WAMY documents, I'm not going to address it any further. And, unfortunately, that focused discussion has never come up. Many of these issues about details about "to," "from," "subject," those things could have been worked out.

And, your Honor, I would note that in terms of supplementing, last night we did finally receive from the

plaintiffs, at 9:00-something p.m., the supplemental answers that were the subject of the December 26th hearing, or December 26th order that we brought up again on February 15, 20 -- I'm sorry, February 19th of 2014 was the last time we were together. And we did just get those finally last night.

One other point, your Honor, that was brought up by Mr. Carter. The WAMY Canada documents that are referenced on the index, copies being in Saudi Arabia. We believe copies have been produced, and if they have any questions about a specific document, well, where's this report or where's this letter, we'd be happy to caucus with them about that. And if there's something they think they're missing, then we'll produce that because we certainly stood before the Court before, and we continue to maintain, that we believe we've produced every WAMY Saudi Arabia document that pertains to WAMY Canada.

THE COURT: Thank you.

MR. GOETZ: That's all I have.

THE COURT: Anything further?

MR. CARTER: Yes, your Honor, if you don't mind, a few things that I'll try and address. The legal rationale WAMY is relying upon is that the party need simply make available for inspection the documents that are responsive. But the discovery rules have a reasonableness requirement embedded in them. And as an example of that, the courts have consistently

held that a parties that has a woefully disorganized filing system can't simply tell the party seeking discovery to go into that woefully disorganized file room and try and find the stuff that's responsive.

And as the analogy, the decision to try and make documents from a variety of locations available for inspection in a location where the State Department has said it is ill advised for U.S. people to travel, whether they can get a visa or not, doesn't comply with that baseline reasonableness standard. And at the end of the day, WAMY International here in the U.S. has care, custody and control over these documents. It's a U.S.-based party. It has an obligation to produce the documents here, where it resides and where the plaintiffs in the litigation also reside. So all of those things --

THE COURT: What's the basis for saying that WAMY International in the U.S. can cause WAMY Saudi Arabia to produce documents?

MR. CARTER: Your Honor, we see within the discovery materials very free flow of information back and forth, when even they have acknowledged, when WAMY Saudi Arabia wanted something to happen to WAMY Canada, it sent the request to U.S. entity to facilitate that role and back and forth. The correspondence all indicate that it is able to go and get documents from WAMY Saudi Arabia. So those are all sort of evident in the documents that they've produced themselves.

With regard to the feasibility of going to Saudi Arabia, you know, Mr. --

THE COURT: One of the things -- before you get to that, what Mr. Mohammedi said was the other locations are equally bad, if not worse. Do you agree with that?

MR. CARTER: You know, I don't know that WAMY's office in the U.S. was particularly disturbing to us. I think it may have maintained an office in London for several years. It maintained an office in Canada. So, you know, not all of its offices are in so-called hotspots. There were plenty of WAMY locations where the documents could have been shipped without presenting this security risk, and it's not just a security risk, as informed by the State Department warning.

As your Honor indicated, there's a potential that the attorneys have Israeli visa stamps or Jewish religious affiliation. There's also the matter of the consultants that one would need to meaningfully review these, and I can say with a level of confidence that they would not be allowed into Saudi Arabia, period. The nature of this case, the kind of consultants you need to deal with counter-terrorism expertise are not going to be allowed into Saudi Arabia for the purposes of doing this kind of inspection.

WAMY, throughout the process, based on the agreements between the defendants' executive committee and the plaintiffs executive committee, has benefited substantially from

plaintiffs' adherence to produce documents in single page TIFF format. Literally, tens and tens and thousands of documents have been collected by plaintiffs in hard copy format.

Everything that came back to us from FOIA was produced in hard copy format. Documents we got from foreign governments were produced in hard copy format. We converted all of those to electronic format and produced them to the defendants, and WAMY's gained that benefit.

The only thing that allowing WAMY to impose costs on us does is trigger a request by us for a corresponding reimbursement for all of the costs we incurred to collect our documents and produce them to WAMY. And that kind of back and forth really doesn't make any sense from a management perspective. Obviously, your Honor has the discretion in managing discovery in an MDL proceeding, to set rules that will ensure that we don't mire ourselves down in certain pointless disputes for many, many years. And this is a circumstance where it seems that the parties' course of conduct, other than WAMY, supports the view that such a rule should exist.

There was an indication that all of the electronic documents, including e-mails, have been produced. We don't recall seeing any e-mails. I raise it only because there was a suggestion that e-mails existing in electronic form had been produced, but we really don't recall seeing e-mails. So that's one consideration.

Again, Mr. Mohammedi said that the discussion about single-page TIFF productions didn't apply to WAMY, but he was a participant in the videoconference; so it's hard for us to understand how a silence during the course of a discussion between the executive committees, can later absolve you of the agreement that everyone else understands to have been reached.

THE COURT: Let me interrupt you for a second. Were you part of that videoconference?

MR. MOHAMMEDI: Your Honor, I cannot recall. I really cannot recall.

THE COURT: Anything else, Mr. Carter?

MR. CARTER: No, your Honor. I think that's it.

MR. MOHAMMEDI: Your Honor, can I just say a few things?

THE COURT: Sure.

MR. MOHAMMEDI: We tried to reach an agreement with plaintiffs. We talked to them. We asked them to split the cost. They refused. We didn't ask them to go to Saudi Arabia if they didn't want to go. So I think the issue here is the cost. It's not about traveling anywhere else.

As far as the e-mails, I'd like to make very clear that I was not referring to e-mails. I was referring to electronic documents, whether they had them, whether they were scanned or whatever. I can't make this representation that all e-mails have been produced because I'm not sure, but I want to

make sure, it was an example that Mr. Goetz made to this Court.

So we were willing, and we are still willing, to work with plaintiffs. If only plaintiff can reach out, we can go into -- we can reach an agreement to do it. We tried. We did our best. However, this does not mean we violated our obligations to search for documents and have them available for production, which is contradictory to what plaintiffs are being said all along against WAMY. Thank you.

THE COURT: As to the situs of production, I wasn't being inattentive when counsel were speaking. If you saw me looking at the laptop computer on my bench, I was pulling up again the State Department web page that talks about travel to Saudi Arabia, which contains numerous cautions. Although, it acknowledges that the climate in recent years has been getting better, but it makes it perfectly reasonable to believe that, assuming all of the attorneys who might wish to review the documents could get into Saudi Arabia would be granted visas, that there's legitimate reasons why they might not wish to be in Saudi Arabia, and assuming that many of the consultants and interpreters, who might be required to assist in the review of the documents, would be viewed as turncoats, I do not view it as practical to turn to plaintiffs' counsel and say, go to Saudi Arabia to review the documents, particularly when, for many of the documents, Saudi Arabia is a location that WAMY chose, for whatever reason, they chose to consolidate the

documents there, any more than I would consider it reasonable if the plaintiffs said, well, we have the documents spread out among law offices in numerous locations. Some of the documents are at Mr. Haefele's office in South Carolina; so start with Mr. Kreindler's offices in New York, then tour South Carolina and the location where Mr. Carter's office is.

It seems to me, in a litigation of this scope, an MDL litigation in particular, the only practical solution is to have each side produce its documents to the other side, rather than having plaintiffs, by way of example, have to go to Saudi Arabia. So for those two reasons, I do not view viewing the documents in Saudi Arabia as a practical solution.

With respect to the indices, the indices clearly are better than some of the indices in the past in this case. As counsel said, they are document specific it appears, but this was, obviously, a significant undertaking and many of the indices really don't tell you much of anything. I'm looking at the first page of -- well, it's not the first page, but a page of one of the exhibits, copy, and the subject is copy of a news published in one of the Pakistani newspapers and replied with, which tells you virtually nothing. And there were other equally uninformative descriptions attached. "Copy of transfer" is another one that I noted.

I spent more time than I care to, at times, looking at privilege logs, which are equally unenlightening. And I'm not

a fan of privilege logs, the way they're currently done, nor of these indices. But I don't think the indices really move the matter forward, nor do I think it's practical at this stage to talk about redoing the indices as a way to specify a subset of documents to be produced to the plaintiffs.

In terms of the cutoff date, I'm of two minds, I suppose. I acknowledge that we were having a specific discussion at the time that we discussed a 2004 rather than a 2002 cutoff date, and it was in the context of setting the other parameter for what was a generic start date that, I guess, Judge Daniels or Judge Casey, I think it was Judge Daniels, had set. But I'm going to reserve decision with respect to the cutoff date and try to move things along by ensuring that at least through 2002, presumably, the documents are produced in relatively short order.

As to the cost, I understand that WAMY is a charity. As I said, I never have viewed the indices of any of the parties -- except for, obviously, the need to produce privilege logs -- I haven't viewed the indices as a particularly practical way to proceed for anybody. I think it was unrealistic to think that the indices would somehow focus the discussion or review and, therefore, lead to less burden.

And taking what WAMY says at face value, obviously, a large sum of money has been spent preparing the indices. But if I were to say that WAMY and the plaintiffs don't have a deal

as to costs or that the deal that, evidently, was struck by the two executive committees didn't bind WAMY, as Mr. Carter said, then by all rights, plaintiffs will be entitled to bill back for the documents that they produced and the cost of some allocable share of producing those in TIFF format, and then we get into battles about the extent to which the documents were responsive to the requests or garbage, on both sides.

So I am going to require that WAMY produce the documents at its cost, and notwithstanding the agreement that documents should be produced in TIFF form, I will leave it to the WAMY defendants to decide whether they wish to ship the documents here, so long as they can be made available in a location where the plaintiffs can practicably review them and indicate that which they have to have or wish to have copied, or whether it's produced in TIFF form, whichever better suits defendants, I will permit them to pursue.

But either TIFFs have to be made available with reasonable dispatch or the hard copy documents. And certainly, any electronic documents that have not been produced, if e-mails have not been produced, there's no longer any reason why e-mails should not have been produced, and those should be produced forthwith.

So I think that I've addressed the issues as to the cutoff date. Again, I want to see where we end up with the production through 2002, and I said I am reserving decision on

that. I'm not reserving it for a week or two. I'm going to wait to see what happens with production through 2002, and then we'll worry about 2002 through 2004. Although, I do think there's some merit.

If it's really, Mr. Carter, particular types of documents that plaintiffs are looking for, I'd encourage you to have discussions with WAMY's counsel and see whether production for that area can be narrowed.

MS. BERGOFFEN: Your Honor, if I may. With regard to the cutoff date, and as it applies to any other party or the defendants in general, a couple of points there. I think I speak on behalf of the other defendants as well. Our understanding is that this would just apply to WAMY. I know that in the case we generally try to have universal things like this apply, but this is not a case in which it should for a few reasons.

If I may use my client, the Dubai Islamic Bank, as an example. Mr. Mohammedi alluded to before to an agreement. We actually have an express agreement with plaintiffs, which was on a document-request-by-document-request basis as to what that particular cutoff should be. In some cases the agreement was that it would be serving documents through 2001 and in others it was through present.

So I mean, to the minimum, I believe this would apply to other defendants as well, and I encourage anybody else to

speak up, but with regard to the Dubai Islamic Bank, we would certainly urge that you not make that ruling apply to us because we have an express agreement already in place with regard to specific dates.

THE COURT: Well, anybody who has an express agreement, I'm certainly not going to meddle with those agreements.

MS. BERGOFFEN: Very good. Thank you, your Honor.

THE COURT: Unless somebody tells me there's disagreement as to what the agreement is. That will read oddly in the transcript, but go on.

MR. CARTER: Your Honor.

MR. MOHAMMEDI: May I -- Go ahead.

MR. CARTER: Your Honor, just a couple of minor points.

THE COURT: Yes.

MR. CARTER: I think it's implicit in your Honor's order that you're reserving judgment as to the 2002 to 2004 period for WAMY, that there's a continuing obligation to preserve documents from that period that are responsive.

THE COURT: Clearly.

MR. CARTER: Is the Court inclined to set a deadline for this production to occur?

THE COURT: I had thought about that, and I'd like the two sides to confer. If you can't reach agreement on that,

then submit a joint letter to me setting forth the two positions.

MR. CARTER: And the last thing, your Honor, was we had already asked in our motion --

THE COURT: Let me just interrupt you for a second and say, I recognize also that Mr. Mohammedi may file objections to this. Although, I think I'm correct that every single objection to a discovery ruling of mine has been denied, at least since Judge Daniels has been the district judge, but I recognize that that possible exists.

MR. CARTER: You are, in fact, batting a thousand, your Honor. The one last issue, your Honor, was that we had asked in the motion --

THE COURT: Although, defendants, or whoever objected this time got a longer decision than some of the other ones.

MR. CARTER: That's correct. We had asked just that there be a clarification that the rulings concerning the sort of central relevance of, for instance, the auditing reports and the supporting documents for the auditing reports for charity defendants, be made clear so that when we get this production, we're sure it encompasses everything that the Court has already acknowledged to be relevant and quoted the claims in the litigation.

THE COURT: Let me try it this way and see whether it deals with your concern. Obviously, anything that's responsive

to your request, except to the extent that I've sustained an objection, needs to be produced.

MR. CARTER: That's fine. Thank you, your Honor.

THE COURT: Anything else as to this?

MR. MOHAMMEDI: I think Mr. Carter already addressed some of the questions we were going to ask.

THE COURT: Okay. Let's move on then to the application for fees and costs.

MR. HAEFELE: Good afternoon, your Honor. Robert Haefele from Motley Rice. We're here for the -- what I think you had identified as the sanctions motions. The sanctions motion is, thankfully, behind us. This is the fee petition related to the sanction motion as a result of that, which as I understand, was upheld in one of the decisions that --

THE COURT: Right.

MR. HAEFELE: -- Judge Daniels issued yesterday, or three of the decisions, I guess. The two that are before your Honor today is one petition that was done jointly related to Al Haramain and to Wael Jelaidin. And, you know, we went through most of what we need to say, I think, in the papers, just like we said -- Mr. Carter said about the WAMY motion. I think most of what we had to say was laid out in the papers, and then the reply papers.

There is a lingering issue, I suppose, as to whether or not the motion for the surreply granted -- allows the

opportunity for the surreply, but I'm not sure that really matters because the arguments in the surreply were essentially the arguments that had been made earlier.

THE COURT: I, obviously, ignored the motion to strike the surreply. And when I was reading it today, I'm not sure it adds much or it's cause for concern; so....

MR. HAEFELE: I think that our whole point was not a motion to strike. It was the opposition to their motion to file a surreply, but regardless, I think it all comes to the same point. Our objection was their surreply made the same arguments.

THE COURT: And I suppose, to the extent it did, I should file an objection also, but --

MR. HAEFELE: At any rate --

THE COURT: At the end of the day, I think the issues have been fully briefed at this point. One thing that concerns me is, obviously, the longer you're on the bench, the more out of date your views of going rates become. But looking at the billing rates and noting, for example, that your firm is in South Carolina, although I know it has a somewhat unique practice, 750 bucks an hour for you, just to pick on you as an example, seemed like a pretty high rate.

MR. HAEFELE: I do feel sort of targeted, your Honor. It's interesting that you should raise me --

THE COURT: Would you rather I pick on Mr. Flowers?

MR. HAEFELE: No, but it is interesting that you would choose me because none of my practice is in South Carolina. Honestly, the ironic thing, and I've had this discussion with a number of folks, is that I moved to South Carolina to work in New York.

THE COURT: And I saw you're not admitted in South Carolina.

MR. HAEFELE: No, no, no. I am admitted in South Carolina because I must be, but because I hold an office in South Carolina, I have to be. So I am admitted in South Carolina, but my point in the brief, your Honor, was that I am not admitted in the District Court in South Carolina, the Federal Court in South Carolina, I am not admitted.

And that was the suggestion, that why should he get the billing rate that a lawyer practicing in a Federal District Court in South Carolina. The truth of the matter is, most of my practice is in the Southern District of New York, and I am admitted in the Southern District of New York, I am admitted in New York, and I think that's pretty much what the rule says. And a number of cases that were cited is -- the question is what venue do you apply the billing rates. It's the --

THE COURT: Before you get to that, then let me pick on Mr. Flowers, unless you're going to tell me that he's similarly situated. The representation is that, for South Carolina clients, he's billing 800 bucks an hour?

MR. HAEFELE: First off, the only reason I'll first start out picking on you about it is it's Miss Flowers.

THE COURT: Oh, Miss, I'm sorry. Yes.

MR. HAEFELE: And Ms. Flowers' situation is similar; although she is admitted in South Carolina. Again, it goes back to the particular nature of the practice of Motley Rice. Our practice is all over the country, and we go all over the country to litigate, usually mass tort cases all over the country. I don't know if you had an opportunity to look at the brochure about the firm that was in the profiles section of our submission, but, I mean, we're talking about the tobacco litigation all over the country. We represented -- the firm's predecessor firm that Ms. Flowers was at, which was Ness Motley at the time, represented the attorneys general all over the country in the tobacco litigation.

Similarly related all over the country in asbestos litigation, and much of Miss Flowers' practice, too, is in New York, Washington, D.C. and elsewhere throughout the country. So, yes, she is admitted in South Carolina, but her practice is all over the country. And I think in that circumstance, to be honest, I can't remember, but I think a lot of it was by pro hac vice admission. But it is a uniquely national practice as opposed to a local one.

THE COURT: But I guess also a lot of it is contingency fee work, right?

MR. HAEFELE: Excuse me?

THE COURT: A lot of it is contingency fee work?

MR. HAEFELE: A lot of it would be contingency fee work, that's correct, your Honor. I don't -- Well, yeah, the tobacco litigation, it was uniquely -- it was a unique contingency fee work, but it was still contingent.

THE COURT: So then I guess that leads to the question, and certainly your firm's not unique in this respect, but the billing rate per hour, therefore, to a certain extent, it is a contrived number because if you're getting a percentage of a recovery, what rate you deem yourself to be billing at may not be an accurate rate.

MR. HAEFELE: I would say this, actually, your Honor. I maybe spoke too quickly. The firm also has a very large portion of the firm, relatively speaking, within the firm, that does securities litigation, and we do have billing rates for that. We have assigned billing rates that are assigned for that purpose.

THE COURT: And do they -- it may be different lawyers but for matters that are billed on an hourly basis, do the rates correspond to the rates that are represented in your application to me?

MR. HAEFELE: I actually think the rates here are -- they generally correspond, but I think for the folks that were in the leadership position here, they might be a little bit

higher. For the folks that are, for example, in a piece of litigation where you were one of many lawyers and you were not necessarily the decision maker, the billing rate might be different.

In this litigation, where the folks that are on that list, particularly Jodi and myself, Ms. Flowers and myself, are on the plaintiffs' executive committee, have different responsibilities, broader responsibilities, representing more than just the Burnett plaintiffs. We come here and we are going to have -- this is a particularly good example, where I'm arguing on behalf of all the different plaintiffs in the case, I think the billing rate was a little higher.

THE COURT: Okay. One infirmity that was raised in opposition is that there's only an affidavit, I guess, from you. You're not in a position to know the billing rates of other law firms firsthand; so at a minimum, one thing I'm going to want is an affidavit from each of the applicant firms with respect to its billing rates.

And I understand that there's some case law. I guess it was Judge Fox, most recently, who may have said it, saying that that should not be provided in reply, but I think that's wholly within my discretion, and the view is dotting I's and crossing T's; so I am going to ask that that be submitted to me, say, within two weeks.

Bear with me a second. Well, there's also the matter

of -- and Motley Rice may be the wrong firm to use as an example. But there is Judge Peck's decision which interprets *Arbor Hill* as requiring that billing be at the rate of the forum jurisdiction or the rate in the locality where the attorney's office is, if that's lower or whichever is lower. I'm not sure whether that actually effects any of the firms. I guess, Mr. Carter, you're from out of town.

MR. CARTER: Philadelphia, your Honor.

MR. HAEFELE: Well, your Honor, I think there's a couple of responses I have to that, as I'm reading -- I mean, I know that's language from one case, but there's multiple other Second Circuit cases and Southern District cases that are pretty particular to the relevant community. And this is -- actually, this is the language I'm reading from *Arbor Hill*.

THE COURT: And the irony is *Arbor Hill* was using it, I forget which law firm he was at, but I remember it was, I think --

MR. HAEFELE: I believe it was the Western District of New York, wasn't it?

THE COURT: No, but the law firm was a New York law firm. I think the lawyer was Mitchell Carlin, if memory serves. But by saying the forum jurisdiction, they were picking -- Judge Walker, I think it was who wrote the decision, was in effect picking the lower number. Here, potentially, you could have the reverse, which I guess is where --

MR. HAEFELE: I'm looking not just at Arbor Hill, but I'm also looking at a case called *AR v. New York City Department of Education*, which the language in that case is the community is typically measured by the geographic area where the action was commenced and litigated, and then in Puglisi --

THE COURT: There's no question that that's what the Second Circuit said, and I'm sure you can find decisions where I've done that, or quoted *Arbor Hill* and not considered whether there should be the lower rate. And I understand your position that, at least for some of the plaintiffs, New York may not have been their first forum, and there's a debate about who, at the MDL stage, urged that the cases be cited here.

MR. HAEFELE: I think that was the explanation that I provided in the brief, was that that leads to a whole host of disputes within the decision itself. I mean, all the firms that are here on the plaintiffs' side, they all have New York offices, every single one of them. And among the plaintiffs' lawyers that were represented in there, for example, one of the Motley Rice lawyers that worked on them is in the billing records, though she's a Motley Rice lawyer, her office was, at one point in Manhattan but at another point was in DC. But, yet, she was working on this case and doing the briefing related to the case in the Southern District of New York.

It runs a -- and then you have the example of me, not admitted in the South Carolina District Court but practicing,

for the most part, in the Southern District of New York and admitted in Southern District of New York. It runs -- the rule that the Second Circuit generally applies is a much cleaner rule that provides, you know, with much clearer guidance than having to have ad hoc determinations based on each of the individual lawyers.

THE COURT: Okay. There was one other question I wanted to ask.

MR. HAEFELE: And while you're looking --

THE COURT: There was one firm as to which, and I'm not sure whether it was your firm or Kreindler and Kreindler. Oh, no. I'm sorry. It was your firm, Judge Forester noted -- and I'm obviously reading from Mr. Kabat's papers, that Motley Rice did not keep time sheets. I take it with respect to this MDL matter, Motley Rice has kept time sheets?

MR. HAEFELE: Your Honor, yes. It's a word that I consistently forget, and I complained to one of my colleagues that I can't remember, but I know I used it three times when I referred to that particular example, but it's just an anecdote. He went -- Mr. Kabat went through and he found one situation where some lawyers from Motley Rice, for a different team within my firm, practicing in a different court on a different matter, didn't keep time. And they went back and they recreated it.

But yes, in the circumstance -- I mean, like I said to

you, we have other teams within our firm, practice groups is what we call them, that keep time. And this circumstance, you know, the -- and it says so in our declaration, that the time records were contemporaneously kept time records; so it's not a situation that's analogous exactly to the circumstance that you had in the anecdote quotation or the circumstance that Mr. Kabat gave.

THE COURT: Assuming it's accurate, I will want the affidavit from somebody knowledgeable at each firm to say what's implicit in the application, which is that summaries are based on contemporaneous time records.

MR. HAEFELE: And I'm assuming that from Motley Rice, the one you received already is okay?

THE COURT: Yes.

MR. HAEFELE: Since it's signed by Motley Rice.

THE COURT: Unless there's something that I conclude, based on the defendant's argument, that should be supplemented, that's accurate. Anything else?

MR. HAEFELE: Not unless your Honor has any -- I mean, I had planned to go through each of the things, but they're pretty much mostly what we said. I would add one thing, your Honor, just to give you a notion of the reasonableness of the fees, or the reasonableness of the billing hours -- I'm sorry, the billing rates.

When I went through and looked at the billing rates, I

took the average of the billing rates that were there, and came up with, I think the average billing rate was $650.

THE COURT: Blended rate amongst all the firms?

MR. HAEFELE: Blended rates amongst all the lawyers.

THE COURT: That's what I meant, but among the four applicant firms?

MR. HAEFELE: I took, yes, all of the lawyers that were listed on there, added them up and calculated the median, and it was $650 an hour.

THE COURT: Right.

MR. HAEFELE: And then I went to the --

THE COURT: The median or the mean?

MR. HAEFELE: First off, let me say at least in the sources that we cited, the median billing rate in New York cited by one of the sources it was $650 an hour, $656 an hour, and with some rates over a thousand, some rates tipping in at almost $2,000 an hour. Obviously, we're not there.

THE COURT: Yet.

MR. HAEFELE: But the median rate identified in the fee petition was just slightly under $650 an hour. But also, if you added up the median number of years of experience, was 18. And if you look at the Laffey rate adjusted for New York, that $750 for an 18-year-experienced lawyer.

THE COURT: I have the Laffey rate in that one decision. I don't consider it particularly significant. I had

to deal with DC rates in that case; otherwise, I would have gone for my career never citing the Laffey cases.

MR. HAEFELE: I understand what your Honor is saying, but it happened to be something that was available to provide a resource to compare different years in the different locations. But I think the other sources that we cited were fairly consistent with that as well. So I think, all things considered, what we provided to your Honor was a good indication as to the reasonableness of the fees of the hourly rates.

THE COURT: Okay. Thank you.

MR. HAEFELE: Thank you, your Honor.

MR. KABAT: Thank you, your Honor. There are some fundamental flaws with plaintiffs' $1 million fee petition, which requires either striking it entirely or drastically reducing it. I'm going to argue with respect to Al Haramain and Mr. McMahon can respond to his client.

First of all, we need to look at the context of this. Plaintiffs are seeking $636,000 for one discovery motion as to one defendant, Al Haramain. Plaintiff had three discrete, independent discovery issues that they raised. They only prevailed on one issue, arguably the least important issue, the delay in producing documents.

Plaintiffs also sought either a default judgment or an adverse inference as to Al Haramain. Your Honor denied either

sanction, and that's the framework we need to look at.

As Judge Hellerstein, handling the aviation litigation, had some very appropriate words that I do want to note. He recognized that the wounds of September 11 will not be easily assuaged, but neither should they be exacerbated by rich rewards of fees and benign indifference to unreasonably large rewards. That's the situation we have here, and we cited a number of cases where the courts have not hesitated to strike entirely fee petitions that were, quote, outrageous and excessive, and unsupported by adequate documentation.

Now, the first issue that your Honor raised was the excessive rates. You know, we cited extensive Second Circuit precedent, which makes clear that in New York City there are multiple legal markets. There's the, quote, Wall Street rate for corporate and securities work, the lower rates for intellectual property work, and there's even lower rates for the rest of us. And that's the rate we should be looking at now.

Plaintiff relies on newspaper articles and surveys, should be entitled little weight because those surveys were looking at the top 350 or top 250 law firms in the country, particularly those with over a thousand attorneys. I mean, this court --

THE COURT: Sorry, I -- you don't have to spend a lot of time convincing me that what Cravath charges its clients is

simply not relevant in terms of deciding what these firms should be charging. But Mr. Carter is at Cozen and O'Connor, right?

MR. CARTER: That's correct, your Honor.

THE COURT: Which is not a small firm, by any stretch; so, you know, all of the information, I suppose, potentially enters into the mix in deciding what the reasonable --

MR. KABAT: Well, let me move on.

THE COURT: -- rate is, but I think that's probably less of an issue than the reasonableness of the hours billed, from your perspective.

MR. KABAT: Well, Judge Peck of this court, in the *Ryan* case, had it exactly right when he said that the rates were created solely for the purpose of charging defendants. These are not rates that the plaintiffs charged their own paying clients, which is yet another reason to strike the fee petition.

The plaintiffs in their reply brief raised the argument, which is why we did a surreply, that the reason this case when transferred here was, quote, largely at the defendants' insistence. Well, that was really strange because I've been in this case for twelve years now, and the record of the judicial panel on both sides of this litigation made clear that all of the plaintiffs here today wanted the case to stay with Judge Robertson in the District of Columbia, and it was

only a few days after Judge Robertson dismissed two of the deep-pocket defendants, Prince Sultan and Prince Turki, that the plaintiffs suddenly switched sides at the hearing before the JPML, scrambling somehow to claim that the case should be consolidated in New York. In fact, they admitted on the record because of Judge Robertson's decision, that they switched sides.

So let me turn back --

THE COURT: If that's correct, assuming it is, do you want me to use prevailing DC rates?

MR. KABAT: Pardon?

THE COURT: You're saying that, but for the plaintiff's trying to get away from Judge Robertson after one of his initial decisions, somebody in Washington, D.C. would be having this discussion with you. And I'm asking whether, therefore, you're saying I should be applying reasonable Washington, D.C. rates?

MR. KABAT: No. Actually, I'm making a slightly broader point, that the plaintiffs, in their reply, chose to completely misrepresent their own representation to the Judicial Panel on Multi-district Litigation, which does concern me.

The second issue I'd like to raise is that despite our repeated requests, and clearly Second Circuit decisions in this court, plaintiffs still have not produced their contemporaneous

time records. Now, Mr. Haefele claims that in his firm, well, there's some practice groups that don't keep time records, but we do. I find that very hard to believe. I've never heard of a law firm where some attorneys were able to make up time as they go along and other attorneys are keeping contemporaneous time records.

THE COURT: Well, one of the problems with producing all of the time records in their original form is they then have to be heavily redacted, and that's a cumbersome exercise. But if you want to test the waters, I will permit you, for each firm, to request the originals, appropriately redacted, for two months.

MR. KABAT: Well, your Honor, the redactions would not need to be that great because if you notice in their spreadsheet, they do give some level of detail. So, presumably, if there really are contemporaneous records, that same level of detail is in those time records and --

THE COURT: Well, they've represented, and I have no reason to believe that they haven't verbatim copied electronically entries from time sheets or that their timekeeping system. You've suggested that the summaries are suspect. The rules of evidence, if this were a trial matter, say that when summaries are used rather than the originals, the originals should be made available to the adverse party.

I'm saying if you doubt the accuracy of the summary

charts, feel free to ask for each of the four applicant law firms for two random months' worth of the original records. I mean, all of us nowadays is electronics; so original is a misnomer. But if you want to see it as it's spit out from the system for particular months, for a maximum of two months, feel free to do that. And if you discover that the summaries are inventions rather than accurate reproductions of the relevant entries, I'm sure you'll let me know.

MR. KABAT: Yes, we certainly would request the time records and --

THE COURT: Okay. Well, I partly granted that request and --

MR. KABAT: Right.

THE COURT: And I'll give you two weeks to -- well, I'll give you one week to make that request, and one week for the firms to respond, and a third week for you to send me a further letter if you have concerns about the accuracy of the tables I've been given.

MR. KABAT: That's fine. And I should mention part of the reason why --

THE COURT: Hang on just a minute.

MR. KREINDLER: Your Honor, I have a 4:00 doctor's appointment, which I thought would give me plenty of time, but I'm going to have to run to that.

THE COURT: No problem.

MR. KREINDLER: Thank you, your Honor.

THE COURT: I thought you were protesting something about the billing records.

MR. KREINDLER: No, your Honor. I thought I'd go back and get our numbers up to a thousand, 2,000 an hour. We're way behind the times. Thank you, your Honor.

MR. HAEFELE: Can I clarify one thing on what your order is?

THE COURT: Sure.

MR. HAEFELE: And it will be quick, I promise. You're talking about -- I just want to get a sense of what redactions would be involved. You're talking about getting billing -- basically the spit-outs of the records that were used to generate that spreadsheets?

THE COURT: For two random months that they will tell you.

MR. HAEFELE: Okay.

THE COURT: So they can tell your firm X month and Y month, and Goldman's firm, A and B months.

MR. HAEFELE: I just wanted to make sure that we weren't talking about us having to produce information about other aspects of the case that we've already worked on.

THE COURT: Well, what you would be doing for those two months is producing the printout as if you were rendering a bill for that month, but you would redact the subject matter on

the entries that don't relate to the application.

MR. HAEFELE: Okay. All right. I'm not sure how that works, but okay. There will be a lot of redaction then. I can tell you that with regard to these entries, I think the only thing that might be redacted would be like names of, you know, certain people that I may have met with that I didn't want to provide them with the information about.

THE COURT: I'm not telling you how to redact it. It may be within these entries there would also be redactions, but I think it more likely would relate to other aspects of what you're doing in these cases.

MR. CARTER: Your Honor, could I just raise one practical consideration? There are days where I have many, many time entries on a time sheet, and I think I'd want to be careful about the redaction process.

THE COURT: Are you talking about block billing entries?

MR. CARTER: No, no. When I enter time, you know, there are individual entries for as little as one-tenth of an hour and two-tenths of an hour. As a consequence, the number of entries in an individual day can grow quite large, and so the process of vetting those to make sure that we're only providing the material relevant to this dispute could take a little bit more time than a week.

THE COURT: Fine. I'll modify that to two weeks.

MR. CARTER: That's fine, your Honor. Thank you.

THE COURT: Okay. Go on, Mr. Kabat.

MR. KABAT: Thank you. The third issue I'd like to address is the limited success. Namely, both the Supreme Court and the Second Circuit have required that the fee award be proportionate to the results obtained, and the degree of success is the most critical factor. The Supreme Court has said that in the case *Farrar v. Hobby*, 1992, and *Hensley v. Eckerhart*, 1983.

And here, as I mentioned at the outset, plaintiff only prevailed on one of three discrete discovery issues as to Al Haramain. That, alone, requires a reduction of the fee petition by two-thirds, as the issues were discrete, not intertwined. Moreover, plaintiffs didn't even obtain either a default judgment or an adverse inference, which requires a further substantial reduction.

Plaintiffs completely ignored the law in their brief and, instead, they relied upon a 1980 decision in their reply brief. Well, that 1980 decision is no longer good law, in light of the subsequent Supreme Court decisions in Farrar and Hensley. And, I mean, they're inconsistent with views not only on this issue but on every issue, to acknowledge controlling Supreme Court and Second Circuit precedent is deeply troubling.

And the fourth factor I want to look at that Mr. Haefele, perhaps wisely, skipped was their request for a

50 percent Lodestar enhancement. While the Supreme Court --

THE COURT: I'm sorry, I missed the last thing you said. The Supreme Court?

MR. KABAT: That their request for a 50 percent Lodestar enhancement, but they ignored the Supreme Court.

THE COURT: Let me save you some time. There's not going to be a Lodestar.

MR. KABAT: Thank you. And the last issue I want to address is that, you know, neither the Court nor the other side should have to put on their eye shades and spend hours going through the fee petitions to identify excessive hours, overstaffing, double billing, redundant work. I spent more time than I care to remember going through color coding and cross-referencing of fee petitions, the fee affidavits.

Probably the most egregious example is routinely billing five or six attorneys to attend status conferences, even though only Mr. Haefele argued as to Al Haramain. Judge Hellerstein in the aviation litigation held that time sending multiple attorneys to a status conference is not compensable.

And even then, plaintiffs billed wildly inconsistent time for attending status conferences. I mean, in one case, we have the Kreindler firm billed two attorneys for one hour each for a status conference only one-and-a-half page of the transcript is devoted to Al Haramain. The other firm didn't even bill Al Haramain for that conference.

The other discovery conferences have wildly divergent time estimates between the firms, but all of those time estimates exceed the actual time devoted to Al Haramain. Judge Patterson in this court some time ago said overbilling or double billing was sufficient ground to strike a fee petition. Judge Ellis also reduced fee petition for duplicative billing.

THE COURT: And one thing I can assure both sides is, if I conclude that there should be reductions in the bill, although from time to time in fee decisions I have gone line by line, here, the amounts sought and the number of time entries is sufficiently large that there is no possibility that I will do that.

If there's a haircut, it will be a percentage haircut, putting aside the billing rate issue. Certainly, that will be based on my review of the time entries, but I appreciate, having done it in other cases, how time consuming it is to go through entries line by line, and I am highly unlikely to resort to that technique in terms of deciding what, if any, the appropriate number here is. Go on.

MR. KABAT: Well, your Honor, in the *Romeo and Juliet* case very recently you held that a 75 percent reduction was appropriate in a Rule 37 fee petition. Judge Fox similarly held a 75 percent reduction in the *Bravia Capital* case. Judge Francis, 80 percent reduction in the *Antonmarchi* case.

So that kind of drastic reduction, given the limited

success, the overbilling, overstaffing, double billing, and we think that a similar substantial reduction in any fee petition, if any award should be made, is warranted here. I mean, what plaintiffs have done is exactly what the courts have warned about. They submitted excessive fee petitions in the hope that the Court will merely reduce their fees to some slightly lower amount, and the courts have decided, on Pages 4 and 5 of our opposition, have not hesitated to strike fee petitions entirely. They are so outrageously excessive, as here, where plaintiffs are not only seeking $636,000 for a discovery motion, but throughout their fee petition and their reply brief, they consistently refuse to acknowledge Supreme Court and Second Circuit precedent that is directly contrary to all of their argument.

I mean this Court would commit reversible error if it grants plaintiffs what they improperly seek, which is why you would be justified in striking the fee petition entirely for misrepresentations of the history of this case and for its, quote, outrageous and excessive demand. Thank you.

THE COURT: Before I get back to you, Mr. Haefele, Mr. McMahon?

MR. MC MAHON: Yes, your Honor. Good afternoon. How are you?

THE COURT: I'm well. Thank you.

MR. MC MAHON: I will be brief. I think the fee

application is excessive, and I do think case law allows you to make a substantial cut in the application. One of the departure points that we have with plaintiffs counsel, and it's obviously going to be your call, as a matter of discretion, is I think they view this as a matter of deterrence. And at least the Southern District case law we saw, *Romeo and Juliet*, Page 2 of our memo, doesn't really get into that. Maybe you can read something like that into the award, but I think that is a difference that we have.

No. 2, there are, obviously, no contemporaneous time records. And I'm not sure if you decided this, but I think Mr. Carter references the fact that he does have the time sheets but never produced them. Am I right on that?

THE COURT: Well, no. Let me extrapolate from what has been said. I think my understanding is that each of the firms has the electronic billing records and can spit out a complete set of entries in chronological order to demonstrate that the records are contemporaneous but would have to redact from what may be many months, if not years, of time entries those which do not relate to their present application.

And I indicated to Mr. Kabat, and certainly the offer is available to you as well, if you don't believe that representation, you can ask to have two random months' worth of entries produced such that you can see that the system is generating something that applies to these cases as a whole,

rather than being some artificial construct that was created after the fact, which apparently was the case in the matter that was before Judge Forester in another Motley Rice matter.

But if you or -- if you and Mr. Kabat are going to make that request, I'd ask that you confer and ask for the same two random months; so that you're not asking each firm to collectively give you four months' worth of redacted billing records. So does that clarify where we're at?

MR. MC MAHON: Yes, your Honor, and I'll accept that proposal. There is, obviously, overbilling in the application. Three attorneys would show up, and Sean Carter was the only one who was there to argue the case. I'm not sure that we have any basis in the record to say, oh, those other attorneys were essential to bring forth the form that Mr. Carter was arguing. I don't see that.

Travel time, I think you should knock that down at least 50 percent, now that there are telephone conferences, among other things that we can utilize. Although, I know that, given the nature of the proceedings, they wanted to appear in front of you personally, but I think you need to knock that down.

Hearings involving other parties, your Honor, I tried to give you some examples of some excessive fee applications on 7 and 8 of our memorandum and various cases, including *Unlucky Trucking* and *Romeo and Juliet*. I think *Romeo and Juliet* had

75 percent reduction, and then in the *Unlucky Trucking*, I think they concluded, the Court concluded that 33 hours was a bit much. And in one of the cases, extraordinary, 437 hours on a single rule 37 motion, that was ridiculous, and I think we cited something on Page 7 to that proposition.

In the Leviathan case, which we stated on 8, I think 36 hours was held to be unreasonable. My simple point, your Honor, you know this, you've been around the track, you have authority to knock the fee application down for various good reasons.

The other departure for one of the plaintiffs, I think, is I don't see how a 50 percent enhancement is available to them --

THE COURT: Well, you missed that part, where I assured Mr. Kabat that there's not going to be a 50 percent enhancement here.

MR. MC MAHON: Okay, your Honor. Well, as I get older, I seem to miss more points. So I will conclude with that, and I wanted to thank you for making it available by telephone conference because I couldn't get up to New York, as much as I love to appear in front of you and say hello.

But, anyway, I think that's it, and I think, as you pointed out, your Honor, we briefed this case thoroughly. I don't think there's any issue we really didn't brief for you. You may disagree with our interpretation of some Southern

District New York case law, but anyway, that concludes my presentation, your Honor. And nice chatting with you again.

THE COURT: Let me just also note that some of the materials I have I looked at online. I printed out some of the materials, and although I'm confident that everybody probably sent me hard copy, today, I didn't see hard copies of some of the documents. And so you may receive a call from my chambers asking you to send duplicate courtesy copies of one or more of the submissions.

MR. HAEFELE: Okay.

THE COURT: Anything else we should take up today?

MR. KABAT: Your Honor?

MR. MC MAHON: Your Honor, just a suggestion. I was on pins and needles since 11:00 -- not pins and needles, but I thought since Judge Daniels had entered his orders, we'd just start with you. I realize that my colleagues don't have their cell phones; so there's no way to say, hey, Martin, we're going to get together at 2:00. It's just a housekeeping matter. I think Mr. Manning and I just decided, well, we'll wait and eventually somebody will contact us.

MR. HAEFELE: Your Honor, I'm not shocked that the defendants think that the submission was excessive, since it's their clients who presumably have to pay it. So it doesn't surprise me that they would think it was excessive.

THE COURT: And I've actually never had somebody whose

response was, yup, that seems reasonable. Who do I make the check payable to?

MR. HAEFELE: Right. But, you know, Mr. Kabat indicates that we threw out these numbers in sort of a negotiation phase. Of course, I would respond and say they throughout their laundry list of objections in an effort to negotiate it down to zero. But when push comes to shove, this is a sanctions motion, your Honor.

This was a result of a sanctions motion, and they come and they want it back to zero, which would make the sanction that your Honor imposed a paper tiger. The defendants have done something wrong. Mr. McMahon thinks that this is not about deterrence, but quite frankly, that is much of what Rule 37 is about. It's preventing the defendants from doing obstreperous -- or preventing the parties from doing obstreperous behavior in the course of discovery and imposing sanctions to deter those defendants and other defendants from doing it again.

THE COURT: But I do think, even if that's correct -- and I'm not quarreling with you -- that, ultimately, I have to decide what is reasonable in the circumstances.

MR. HAEFELE: I don't disagree with that, your Honor. I would agree with that, but in terms of -- and I understand the way we presented it was giving your Honor the discretion whether or not to impose a lodestar, and I understand your

Honor's decision not to impose a lodestar, which does significantly deflate the numbers that Mr. Kabat kept putting out about over a million dollars.

And to put it in perspective, your Honor, the numbers that we're looking at here, are $263,592 for Mr. Jelaidin and $387,474 for Al Haramain, which are significantly lower. Then, on top of that, your Honor, is the $65,000 and some change for the various briefings that went into this.

And, your Honor, for those, what we would propose is that, to the extent you grant those, and those are hard costs, I think, for the time that went into this, those should be much less debatable. But at any rate, that they be imposed joint and severally. To the extent -- What we are concerned about is that there may be one defendant that may default and not pay.

To the extent that these briefs were done jointly for both, I would have done essentially the same brief for one with maybe a section of it cut out, maybe Mr. Jelaidin's section wouldn't be appearing in the brief, but essentially most of the law applied to both defendants. And one defendant shouldn't get the benefit of the other's default.

THE COURT: That is something I will look at.

MR. HAEFELE: All right. But in terms of the reduction that they've requested for the, quote, lack of success. Our goal, your Honor, the plaintiffs' goal was to obtain sanctions against the defendants to deter the defendants

from the kind of behavior. And, quite frankly, you know, we believe that we will have done that depending much on how harsh the fee petition sanctions result and what the result of those are. So in a sense, whether or not we've achieved our goal really depends on the message that your Honor sends in imposing it.

In terms of the allegations of excessive hours, I think there were two allegations, the overstaffing, too many lawyers at conferences and the redundant work, too much conferencing among the lawyers. You know, in this case, as we indicated in the briefing, your Honor, it's a hotly contested case, as your Honor knows. We're in front of you periodically, probably more than you would like us to be here. As much as I know you love us, I'm sure you'd rather not see us as much.

THE COURT: I don't recall ever saying I love you.

MR. HAEFELE: But you love us --

THE COURT: And just for the record -- Go on.

MR. HAEFELE: You love us and hate us equally. I'm sorry. But there is this need for vigorous preparation when it's as hotly contested as it is, where the lawyers do need to confer. Even though we are -- even though I'm standing here today, it is not just me. I have conferred with my colleagues behind the scenes.

The fact that one lawyer, based primarily on a CMO that was entered in this case creating the plaintiffs'

executive committees, we're obligated to, behind the scenes, work together so that when we come to the court and come to the defendants, we put forth, as much as we can, one voice.

Sometimes it can't be done, but quite frankly, all of us have benefited by the almost universal aspect of, we have come and either Mr. Carter or I or somebody else, presents one argument primarily for the whole group. But that doesn't mean that Mr. Carter is the only one that's ever worked on it.

And, you know, based on what the folks on the other side of the aisle have said, it seems very nice that some of the other folks on the aisle are apparently showing up here and not billing their clients. I'm pretty sure that's not the case. The lawyers that come to the litigation, even though they're not arguing, when they're sitting in the courtroom, they are working. And I think that the fact that they would imply that these lawyers come here and shouldn't be billing for their time is sort of an odd goose and gander sort of thing from the other side because I'm pretty sure they're all billing for their time.

MR. KABAT: Your Honor, if I may to respond for one minute?

THE COURT: Well, let me just see whether Mr. Haefele is done.

MR. HAEFELE: Your Honor, the biggest -- I think there were two, maybe three reductions, two that I can think of off

the top of my head, that we've already done. We've already gone through and we've cut out -- we had, it was called to our attention by the defendants, that we had billed full time for travel time, regardless of whether or not work was done.

We went through and we did reduce the travel time billing by 50 percent to the extent that work wasn't performed. I think there was one or two instances where there were no indication in the billing records that work -- I'm sorry, there were one or two instances where there was indication that work was performed.

I can candidly tell you that I know, myself, when I'm traveling to the hearing, I'm working, because I'm preparing for the hearing, particularly when I'm the one that's going to be arguing. And almost all the instances, I'm working. But if it wasn't represented in the billing record, we didn't bill for it. And maybe, this might not be the case going home, but in all instances that's actually where the defense got a windfall.

Other circumstances, as Mr. Kabat indicated, where there are some disputes, they don't represent instances where the time should be cut. They represent instances where the defendants got the windfall, where one lawyer didn't pick up the billing instance and put it in the submission. I mean, these submissions aren't all the billing records of the firms. They are the billing records for the instances that we identified as being related to this. If the lawyer didn't do

it, didn't identify it, that's an instance where they got a windfall where the lawyer didn't ask them to pay.

THE COURT: I have never pad a circumstance where the records are pristine. You have five people at a conference, there were different time indicators, frequently, for each of them, which can be explained by people being present for different portions of the conference or people not being completely accurate in their billing one way or another.

MR. HAEFELE: Instances where real life gets in the way?

THE COURT: Exactly. So I'm mindful of all of that, and all of those are factors that I will consider in deciding.

MR. HAEFELE: And I just want to make sure that your Honor was aware that I think there was an allegation that we had charged time for -- or I'm sorry, charged expenses for meals. I don't know -- honestly, I never really figured out whether that was allowed or not, but we made a conscious decision to strike all the meals from that. So the expenses don't reflect meals.

And other instances -- there were other potentials for adding billing time. There were a number of staff members that, you know, I know in a number of litigations we worked on, where we have submitted billing, in securities litigation for example, the paralegal work time and the staff time is included. Other than there's only one instance where one of

the staff members was included, but by and large, I know I had at least four other folks that time could have gone on, but we consciously made the decision to exclude that.

So there has been some, if you will, some haircutting done already, in addition to the haircutting where we went and we cut off about $20,000 when we did the re-revision. We cut down some of it by 50 percent on the travel time and some other things. But in terms of having multiple lawyers here, again, you know, we're representing multiple plaintiffs on a multiple PEC's and having multiple lawyers here, the same way the defendants have -- Randy has two lawyers here today. It's not unheard of and it's not a particularly deciding issue.

THE COURT: Thank you.

MR. KABAT: I'll be very brief. Mr. Haefele, for the first time, did suggest that there might be joint and several liability, which I think he means that somehow Al Haramain might be liable for Mr. Jelaidin. Is that what you meant?

MR. HAEFELE: I'm not sure I understood the question.

MR. KABAT: You made the issue of joint and several liability.

MR. HAEFELE: Oh, I was purely speaking responsibility for payment of that portion, not joint and several liability for the litigation. I think he's referencing --

THE COURT: Well, let's assume that -- and I have not looked through the billings. I have no preconceived notion,

but let's -- I'll take a very low number. Let's assume that I conclude that one defendant should pay 50,000 and the other should pay 40,000. You're saying that if one of them defaults, the other should pay 90?

MR. HAEFELE: No.

THE COURT: That was, I think, what Mr. Kabat's understanding --

MR. HAEFELE: Maybe I was unclear and, hopefully, the transcript bears out what I said, but let me reiterate what I meant. There's really, as I see it, three portions of the award, if you will. There's one portion of the award that is for Al Haramain for the time and expense of the Al Haramain sanction proceedings. There's the time and expense for the Wael Jelaidin sanctions proceedings, and then there is the time to prepare the briefs related to what we're here for today. And that was done -- I mean, it was related equally to both of them, for the most part.

THE COURT: So you're saying for that last piece of it, you're seeking joint and several --

MR. HAEFELE: Responsibility, if you will.

THE COURT: It's really you're just saying -- Well, yes. What you're seeking is joint and several liability such as if Al Haramain doesn't pay, Jelaidin would or vice versa.

MR. HAEFELE: That's correct, your Honor.

THE COURT: As to that piece?

MR. HAEFELE: As to that piece alone, yes.

MR. KABAT: I appreciate that clarification. Since according to their spreadsheet, the time for the fee petition is only five percent, roughly, of the total fee; so we're talking about a microscopic amount.

Now, Mr. Haefele claimed that between the original fee petition and the reply brief, they made some reduction. Your Honor, that was a microscopic reduction. It was under five percent, which in the context of a million dollar fee petition, isn't much, unfortunately.

Mr. Haefele mentioned the issue of conferencing and the different time involved. What I don't understand is how one firm can claim several hours for a plaintiffs' executive committee conference that no other firm even recorded. So that clearly calls into question the nature of what was billed, how it was billed, and which is why we're looking forward to seeing the contemporaneous time records from all four firms.

THE COURT: Okay. I've given you those.

MR. KABAT: That's why we're looking forward to seeing them.

THE COURT: Is there anything new you wish to add?

MR. KABAT: Thank you.

THE COURT: Okay.

MR. KABAT: One issue, your Honor. Judge Daniels set a status conference on July 15 at 11:00; so we would suggest

that the next discovery status conference be on the same day following the conference with Judge Daniels, however long that takes, if your Honor is free on that day, July 15th at 11:00 a.m.

THE COURT: I'm in California that day; so that doesn't work for me.

MR. CARTER: Your Honor, I was just going to mention that we may have a need or reason for a conference before that. I don't know specifically right now. My suggestion would be that if that need arises, we'll just write to the defendants and try to reach an agreement.

THE COURT: Okay. But it probably would be useful to -- I know the summer it's not an easy time. I'm going to, just so that we have some time reserved, set July 21, which is a Monday, at 2:00 p.m. I'll be glad to cancel that if there are no issues.

MR. HAEFELE: What time, your Honor?

THE COURT: 2:00. That way, people don't have to travel on a Sunday if they're coming. And I don't know whether everybody had their calendars, I suspect not.

MS. BERGOFFEN: Actually, I have a conflict that day, your Honor, but if it's possible, to move it. If not, I could see if somebody else can cover it.

MS. HENRY: Likewise, your Honor. There are two different attorneys that have conflicts in our office on that

day. If it could be moved, that would be great.

THE COURT: Let's see. I have a trial starting the 22nd. July 10th at 2:00 p.m. That's a Thursday.

MR. KABAT: At what time?

THE COURT: 2:00 p.m. And what I may do is confer with Judge Daniels and see whether he has availability that morning, so that it's all on the same day, but I just can't rearrange my schedule to be available on the 15th.

MR. MOHAMMEDI: Your Honor, I don't have my calendar here; so I won't be able to confirm if I have conflict or not.

THE COURT: Okay. We're probably not going to have complete unanimity, in any event. Okay. Thank you all.

MR. HAEFELE: Your Honor, one last thing.

THE COURT: Yes.

MR. HAEFELE: It's just short. Hopefully this might help. I'm not sure. But a variety of numbers were bandied about. I would like to give you the number that the plaintiffs are looking for, without -- I understood you said no enhancement, if I can just give you those numbers and you, obviously, can do as your Honor --

THE COURT: Sure. Why don't you do that -- in fact, rather than spreading it on the record, when you make the other -- You're not making a submission to me, but why don't you send me a letter that has the numbers.

MR. HAEFELE: Okay. All right.

THE COURT: Okay? Thank you.

MR. HAEFELE: Thank you, your Honor.

(Adjourned)